HARVARD LAW REVIEW

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THE new course on the Peculiarities of Massachusetts Law and Practice, the foundation for which has been furnished by a generous friend of the Law School, is a valuable addition to the work of the School. This is understood to be part of a plan for giving similar instruction in the law and practice of other leading States when funds can be obtained for the purpose. Mr. Frank Brewster, a graduate of the class of 1883, has been appointed to conduct the present course.

THE following list shows the number of students in the Law School on October 10th. A reference to the right-hand column will show the gain or loss as compared with the number present October 10, 1889: —

October, 1890.		October, 1889.	
Third Year	43	Third Year	51
Second Year	73	Second Year	60
First Year	97	First Year	77
Special Students	60	Special Students	56
Total	273	Total	244

We insert below an extract from the Harvard Law School Association circular of October 1, 1890, sent us by the Treasurer of the Association: —

The Association, organized September 23, 1886, now numbers 1,519 members, representing forty-three States and Territories of the United States, the Dominion of Canada, and various foreign countries, and distributed as follows: —

Alabama,	5	Georgia,	10	Maryland,	21
Arkansas,	3	Illinois,	60	Massachusetts,	619
California,	37	Indiana,	12	Michigan,	15
Colorado,	15	Iowa,	11	Minnesota,	21
Connecticut,	15	Kansas,	3	Mississippi,	1
Delaware,	9	Kentucky,	16	Missouri,	40
Dist. Columbia,	27	Louisiana,	4	Montana,	3
Florida,	1	Maine,	27	Nebraska,	3

New Hampshire,	16	South Dakota,	1	Cape Breton Island,	1
New Jersey,	22	Tennessee,	5	New Brunswick,	20
New York,	189	Texas,	9	Nova Scotia,	10
North Carolina,	3	Utah,	3	U. S. of Colombia,	1
North Dakota,	1	Vermont,	4	Austria,	1
Ohio,	74	Virginia,	4	Japan,	2
Oregon,	4	Washington,	7	Harv'd Law School,	79
Pennsylvania,	48	West Virginia,	3		
Rhode Island,	21	Wisconsin,	10		1,519
South Carolina,	1	British Columbia,	2		

The membership roll comprises the names of nearly one-half of the whole number of former students of the Harvard Law School, known to be living, and includes representatives from the classes of 1825, 1829, and from every class from 1831 to the present time.

The following table shows the growth in membership of the Association since the publication of the first regular report by the Council on April 1, 1887: —

April 1, 1887, total membership . . .	560
January 1, 1888, " " . . .	642
January 1, 1889, " " . . .	822
January 1, 1890, " " . . .	963
September 15, 1890, " . . .	1,519

NOTICE TO THIRD-YEAR MEN. — The Harvard Law School Association offers a prize of one hundred dollars for the best essay on any of the following subjects: —

I. Rights and Remedies of Minorities in Political and Civil Corporations.

II. Constructive Trusts arising out of Fiduciary Relations.

III. Judicial Legislation: its legitimate function, if any, in the development of the Common Law.

Competition for the prize is open to members of the third-year class, only. Competitors are requested to limit their essay to 50 pages of manuscript, the usual legal quarto size. The essays must be sent to the Secretary of the Association, 220 Devonshire street, Boston, Mass., on or before April 15, 1891. The prize will be awarded at the meeting of the Association which is to be held in Cambridge, in June, 1891.

LOUIS D. BRANDEIS, *Secretary*.

AMONG the many recent articles on the subject of marriage is an interesting paper on "The Cause of the Increase of Divorce," by Mr. Sydney G. Fisher, of the Philadelphia bar, formerly a member of the Harvard Law School. He calls attention to the fact that while in most of the States at the beginning of the century the laws allowed substantially the same freedom of divorce as at present, it is only very recently that people have begun, to any great extent, to take advantage of these laws. It is an error therefore to attribute the increase in divorce to changes in the law. To say that the cause is a change in public opinion, is but truism. Mr. Fisher, therefore, proceeds to examine the origin and growth of public opinion. He finds that the theory of indissoluble marriage has been handed down from the middle ages; he examines in some detail the cases in the Ecclesiastical

Courts; states many absurd arguments which were put forward; and fails to discover any that will bear for one instant the light of modern criticism.

This doctrine of indissoluble marriage, however, was so forcibly impressed upon men's minds that it is only within the last thirty years that the world has really awakened to the fact that all the mediæval arguments for the indissolubility of marriage are sheer nonsense and superstition, and that there are no other arguments.

Herein, then, lies the cause of the increase of divorce. In Mr. Fisher's own words, —

"The arguments which upheld indissoluble marriage are gone, and the arguments which upheld semi-indissoluble marriage (if I may be allowed the word) are also largely gone. If we intend to stop divorce we must invent new arguments. Abstract or mystic theories will be of no avail. The subject is down on the bed-rock of utility. We must show by actual proof that divorce is an evil in its practical results. The statistician must take the place of the priest. Probably all that we shall be able to show will be that certain causes of divorce are evil in their results."

The possibility of inventing satisfactory arguments Mr. Fisher does not discuss, but in a later article, published in the "Philadelphia Sunday Press" of July 13th, 1890, he lays stress upon the importance of preserving "the family," and insists upon the necessity of scientific investigation of the whole subject.

Whatever opinion one may hold as to the existence of arguments, one cannot but join Mr. Fisher in his demand for thorough investigation, and render acknowledgment to him for his own careful research.

THE case of *Cochrane* v. *Moore* (25 Q. B. D. 57) is one of much interest. The well-known decision of *Irons* v. *Smallpiece* (3 B. & Ald. 551), that delivery was necessary to the parol gift of a chattel, though apparently settled law in this country, has not, as is shown by the collection of authorities in Professor Gray's note to *Irons* v. *Smallpiece*,[1] been treated with great respect in England; and later decisions had so far shaken it that Lopes L. J. felt bound to hold in *Cochrane* v. *Moore* at nisi prius that delivery was not necessary to a gift. But the Court of Appeal has upheld *Irons* v. *Smallpiece* in an elaborate judgment. The point was not, indeed, necessary to the decision; various considerations arose on the facts, among others the inquiry whether the subject-matter of the gift, the undivided fourth part of a horse, was susceptible of delivery at all; and as to the actual decision the court agreed with Lopes L. J. and dismissed the appeal. They discussed, however, at great length the question decided in *Irons* v. *Smallpiece*. The following passage from the opinion of Fry L. J. speaking for himself and Bowen L. J. indicates the grounds of the decision: "This review of the authorities [the opinion contains an extended investigation of the early reports and text-writers] leads us to the conclusion that according to the old law no gift or grant of a chattel was effectual to pass it, whether by parol or by deed and whether with or without consideration, unless accompanied by delivery; that on that law two exceptions have been grafted, one in the case of deeds and the other in that of contracts

[1] Gray's Cas. Property, 167.

of sale where the intention of the parties is that the property shall pass before delivery; but that as regards gifts by parol, the old law was in force when *Irons* v. *Smallpiece* was decided;" and he concludes that that case has not been overruled.

Among the citations collected by Professor Gray there are several which appear to have escaped the attention of the court. Lord Hardwicke's comment in *Ward* v. *Turner* (2 Ves. Sen. 431, 442) on the passage cited by Fry L. J. from Jenkins's Centuries, 109, Case 9, is interesting; and the observation of Baron Parke in *Ould*s v. *Harrison* (10 Ex. 572, 575) seems to throw light on the question discussed by the Lord Justice, of that eminent judge's attitude towards *Irons* v. *Smallpiece*.

The concurring opinion of the Master of the Rolls is noticeable. He draws a distinction — not wholly easy to understand — between "fundamental propositions of law" and the "amount or nature of the evidence which will satisfy a court of the existence of such a proposition." The former, he says, nothing but an Act of Parliament can alter, while the latter may be changed by judicial decision; and since he concludes that delivery is not a piece of evidence to prove a gift, but "one of the facts which constitutes the proposition that a gift has been made," he feels constrained to hold that delivery must remain a necessary part of an oral gift until the law is altered by Parliament.

THE method pursued by the Master of the Rolls in *Cochrane* v. *Moore* and the theory which his opinion indicates of the nature of law call to mind the noteworthy address of Mr. James C. Carter on the "Origin and Growth of Law," delivered at Saratoga on August 21st, before the American Bar Association. Mr. Carter takes issue with Austin's definition of law as a command issued by a superior to an inferior. According to his own view, the lines of which were indicated to some extent in his earlier address on "The Provinces of the Written and the Unwritten Law,"[1] law is "not a command nor a body of commands, but consists of rules springing from the social standard of justice, and which have been framed in the course of the application of that standard through a long period to the transactions of men," — "the expression of the universal habits and customs of the people in their jural relations." The judge is an expert appointed to "search" for and declare the law, and to "affix to it his official mark by which it becomes more certainly known and authenticated." The office of the legislator comes after that of the judge in the order of social development, and his work is properly supplementary, — to assist society in forming new customs and in getting rid of old ones which it has outgrown. The true function of legislation closely resembles that of the judiciary in "affixing the public mark and authentication upon customs and rules already existing, or struggling into existence, in the habits of the people."

The address is undoubtedly one of great value and importance; in some respects, however, it seems open to question. The reasoning, for example, by which Mr. Carter seeks to prove that a statute which is not enforced loses its character of law, is not wholly convincing. It may be admitted that a statute which is "not in accord with the habits,

[1] See 3 Harv. L. Rev. 279.

customs, and thoughts of the people" will not be enforced; but does it follow that it is the agreement with these habits and customs which "*makes it law*"? Again, in regard to Mr. Carter's treatment of the "universal and necessary maxim that every one is presumed to know the law," which he regards as inconsistent with Austin's conception of law, the objection suggests itself which has been expressed by Maule J. in *Martindale* v. *Falkner*,[1] that the maxim *ignorantia juris non excusat* is incorrectly expressed when put in the form of a presumption. The characterization of Bentham "as most accurately described by the vulgar designation of crank" has attracted some criticism which seems not undeserved. For if it be admitted that Bentham was a "crank," he was a great deal more than that, — he was one who has powerfully affected the development of the law.

It may be observed that criticisms of Bentham's and Austin's theory of law similar in their nature to Mr. Carter's are to be found in Sir Henry Maine's writings.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

BILLS AND NOTES — PAYMENT. — Where the drawer of a check has no funds on deposit with the drawee for its payment, the payee need not present the check for payment before suing on the original demand, even if it can be proved that the drawee would have paid the check if presented. *Culver* v. *Marks*, 23 N. E. Rep. 1086 (Ind).

BILLS AND NOTES — TWO JUDGMENTS. — Recovery of judgment on a contract by the maker of a note to procure an indorser is no bar to an action on the note although the damages on the contract were assessed at the amount due on the note. *Vanuxem* v. *Burr*, 24 N. E. Rep. 773 (Mass.).

CONSTITUTIONAL LAW — DUE PROCESS OF LAW. — A Minnesota statute empowers the railroad and warehouse commission of that State to compel a common carrier to adopt such charges as the commission "shall declare to be equal and reasonable." There is no provision for a hearing before the commission, and the Supreme Court of Minnesota declared that the statute made its decision final and conclusive as to what are "equal and reasonable" charges. The statute was *held* unconstitutional. The commission cannot be regarded as a court of justice, and since no appeal from its decision is allowed, the statute would deprive the carriers of their property "without due process of law." Bradley, Gray, and Lamar, JJ., dissenting. *Chicago, M., & St. P. Ry. Co.* v. *State of Minnesota*, 10 Sup. Ct. Rep. 462.

CONSTITUTIONAL LAW — HABEAS CORPUS. — An act of Congress gives the Circuit Courts power to issue writs of *habeas corpus* on the petition of a person alleged to be in custody "for an act done or omitted in pursuance of a law of the United States." *Held*, that the word "law" is there used in the broad sense, and includes any duty of a United States officer which can be inferred from the general scope of his duties.

The Constitution declares that the President "shall take care that the laws be faithfully executed. *Held*, that he can direct a United States marshall to accompany and protect from a threatened assault a justice of the Supreme Court while in the discharge of his official duties.

On both these points Fuller, C. J., and Lamar, J., dissented. *Cunningham* v. *Neagle*, 10 Sup. Ct. Rep. 658.

[1] "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so." *Martindale* v. *Falkner*, 2 C. B. 719; and see 3 Harv. L. Rev. 165.